STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. Y-05/09-267
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families, Family Services Division substantiating a report that the petitioner physically abused her daughter. The Department has moved for summary judgement based on a guilty plea to "simple assault" by the petitioner in District Court regarding the same incident. The first issue is whether the judgment of the District Court is binding on the Board as a matter of collateral estoppel. If so, the second issue is whether the Board has the authority to order the Department to reconsider its investigation and decision in the case based on amendments to the underlying statutes that became effective during the course of this fair hearing.

DISCUSSION

I. **Substantiation/collateral estoppel.**

The facts necessary to frame the issue of collateral estoppel are not in dispute. On December 10, 2008 the petitioner became involved in a verbal and physical

altercation with her daughter, who at the time was fifteen years old. The police were called, and it was reported, *inter alia*, that the petitioner had thrown a phone at her daughter that had struck her on the right hand causing "pain, swelling and bruising to the middle finger". As a result of the incident the petitioner was charged the next day with "simple assault".[1]

On February 2, 2009 the Department notified the petitioner that after an investigation it had determined that she had "physically abused" her daughter and that her name would be placed on the Department's child abuse registry. On February 24, 2009 the petitioner requested an administrative review of this decision.

On March 10, 2009 the petitioner pled guilty in Vermont District Court to the charge of "simple assault", with the court noting in its entry: "Plea found to have a factual basis".

In a Review decision dated May 4, 2009 the Department upheld its decision substantiating the report of physical

[1] From the court records submitted with the Department's motion it appears that the petitioner was enjoined, at least preliminarily, from going near the family residence and from having any contact with her daughter.

abuse. The petitioner appealed this decision to the Board, and the Department has moved that the Board affirm the substantiation as a matter of collateral estoppel.

Abuse and neglect are specifically defined in the statute, in pertinent part, as follows:

> (2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare.
>
> (3) “Harm” can occur by:
>
> (A) Physical injury or emotional maltreatment;
>
> . . .
>
> (6) “Physical injury” means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.
>
> 33 V.S.A. § 4912

The petitioner’s opposition to summary judgment is based on two arguments. First she maintains that the Department, by conducting an administrative review hearing and making specific findings regarding the incident, has “waived” its right to ask the Board to rely on the petitioner’s criminal conviction as the sole basis of its decision. In the alternative, she maintains that the injury to her daughter should be considered “accidental”, and that this issue was

not resolved by her conviction for simple assault. Neither argument is availing.

Hearings before the Board are *de novo*. *In re Houston,* 180 Vt. 535 (2006); *In re Ryan*, 2007 Vt. 167 (June 26, 2008). As such a petitioner suffers no prejudice or denial of due process if the Department raises collateral estoppel for the first time in an appeal before the Board. The Board has repeatedly and consistently adopted the doctrine of collateral estoppel in prior proceedings of this nature and has relied on the test established in Trepanier v. Getting Organized, Inc. 155 Vt. 259 (1990), to determine whether it is precluded by the findings in a court proceeding from making its own findings in the context of a substantiation hearing. The Board's policy in this regard was recently upheld by the Vermont Supreme Court in *In re P.J.*, 2009 VT 5 (August Term, 2008). See Fair Hearing No. 20,854.

The *Trepanier* criteria approved by the Court in these matters are as follows:

> (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;
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> (2) the issue was resolved by a final judgment on the merits;
>
> (3) the issue is the same as the one raised in the later action;

> (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
>
> (5) applying preclusion in the action is fair.
>
> *Id* at 265.

In this matter, the petitioner concedes that (1) she was a party in the earlier District Court proceedings, which (2) resulted in a final verdict. She argues, however, that the issue in her abuse appeal is not the "same" as the one resolved by the District Court in her conviction for simple assault (see #3, *supra*).

As noted above, "physical harm" is defined in abuse statutes as "death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means". 13 V.S.A. § 1023 defines the misdemeanor crime of "simple assault" as follows:

> (a) A person is guilty of simple assault if he (sic):
>
> (1) attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another; or
>
> (2) negligently causes bodily injury to another with a deadly weapon; or
>
> (3) attempts by physical menace to put another in fear of imminent serious bodily injury.

The petitioner concedes that her actions against her daughter were "reckless", as that term is used in the above

criminal statute, but she argues that they could nonetheless be deemed "accidental" in applying the abuse statute.

In interpreting the phrase "other than accidental means" in 33 V.S.A. § 4912(6) the Board has adopted the "gross negligence" standard used in *Rivard v. Roy,* 144 Vt. 32 (1963). In Fair Hearing Nos. 17,588 and B-06/08-293 the Board held that this requires a finding that:

> ...the act (a) demonstrated a failure to exercise a minimal degree of care or showed an indifference to a duty owed to another and (b) was not merely an error of judgment, momentary inattention or loss of presence of mind.

The Board also noted in those cases that the Department's policies in effect at that time echoed this approach: i.e. "physical injury is not abuse when the injury occurred accidentally, there was no intention to cause harm or a reasonable person could not have predicted harm".

In light of the above it must be concluded *as a matter of law* that the element of "recklessness" required for a determination of guilt of simple assault under 13 V.S.A. § 1023 is dispositive of whether the "physical injury" under 33 V.S.A. § 4912(6) occurred "by other than accidental means". The Board need not look beyond the plain language of either statute. If the petitioner pleads in one forum that her actions were criminally reckless, she cannot reasonably

expect to be able to argue in another forum that those same actions were "accidental". Thus, it must be concluded that the third *prong* of the Trepanier test is met.

As for the remaining tests in *Trepanier*, the Board has consistently held, and the Vermont Supreme Court has affirmed, that it is "fair" to apply the doctrine of collateral estoppel in cases in which there has been a full and fair prior opportunity to contest the underlying factual issue of child abuse or neglect. See *In re P.J.*, Id. Inasmuch as there is no dispute that the petitioner in this matter pled guilty and was convicted of simple assault as a result of the same incident that is under review here, the petitioner cannot now relitigate the issue of whether the report of sexual abuse was substantiated.

II. **The Department's discretion to reconsider its substantiation.**

The above notwithstanding, and in the alternative, the petitioner appeals the Department's refusal of her request that it *reconsider* at this time its decision placing her name in the child abuse registry. The petitioner has submitted extensive allegations and evidence (including the guilty plea itself) of accepting responsibility for her actions, and of

her "rehabilitation". The Department's position, however, is that once it has substantiated a report of child abuse it does not have the discretion to consider the expungement of that report from its registry until at least three years have elapsed. The Department also maintains that once there has been a substantiation, the Board lacks the statutory authority to order any expungement or reconsideration of the matter before the running of that three year period.

The Department's position regarding its lack of discretion to "expunge" a substantiated report of child abuse before three years is supported by a plain reading of 33 V.S.A. § 4916c(a), which provides:

> A person whose name has been placed on the registry prior to July 1, 2009 and has been listed on the registry for at least three years may file a written request with the commissioner, seeking a review for the purpose of expunging an individual registry record.

However, during the time in which this case first came before the Board, other aspects of the abuse reporting laws had been extensively amended, effective July 1, 2009. In one of the several status conferences with the hearing officer, the Department admitted that had this same incident been reported to the Department after July 1, 2009, the Department *from the outset*, knowing what it does now, might have handled the matter as an "assessment" rather than an "investigation"

under 33 V.S.A. § 4915. Thus, pursuant to § 4915a(d) (*supra*), the incident might not have resulted *procedurally* in a "finding of abuse" leading to the petitioner's name having been placed in the child abuse registry pursuant to 33 V.S.A. §§ 4915b and 4916a. In other words, it is possible that the petitioner in this matter is now in the child abuse registry for a minimum of three years *solely* because her case came to the Department's attention six months prior to the above changes in the statute and corresponding changes in the Department's own assessment/investigation procedures (see DCF/FSD Rules §§ 2000 *et seq*.).

In light of above possibility, the second issue in this matter is whether the Board has the statutory authority to order the Department at this time to reconsider this arguably harsh result--i.e., to order a "do-over" by the Department of its *initial consideration* of the matter to determine whether it would proceed with an "assessment" or an "investigation", *retroactively* applying 33 V.S.A. § 4915.

The Board's statute, at 3 V.S.A. § 3091(d), provides as follows:

> After the fair hearing the board may affirm, modify or reverse decisions of the agency; it may determine whether an alleged delay was justified; and it may take orders consistent with this title requiring the agency to provide appropriate relief including retroactive and

> prospective benefits. The board shall consider, and shall have the authority to reverse or modify, decisions of the agency based on rules which the board determines to be in conflict with state or federal law. The board shall not reverse or modify agency decisions which are determined to be in compliance with applicable law, even though the board may disagree with the results effected by those decisions.

As discussed above, it must be concluded that the Department's decisions "substantiating" the report in question as one of child abuse and refusing to consider "expungement" sooner than three years from the date of entry into the registry were in compliance with the "applicable law" *that was in effect at the time the Department made those decisions*. In light of this, the Department argues that regardless of the *prospective* effect of the above-cited amendments, the Board does not have the statutory authority to order the Department to, in effect, "reopen" this or any other investigation completed prior to July 1, 2009. In the absence of any discernible intent by the legislature to make the provisions of 33 V.S.A. §§ 4915 *et seq.* in any way retroactive, the Board agrees with the Department that such an order would exceed the range of "appropriate relief" under 3 V.S.A. § 3091(d), *supra*.

ORDER

The Department's decision substantiating the report in question as child abuse is affirmed.

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